

# ATTORNEY GENERAL

## STATE OF MONTANA

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February 20, 2018

Governor Jay Inslee  
Office of the Governor  
P.O. Box 40002  
Olympia, WA 98504-0002

Re: Washington Substitute Senate Bill 6203

Dear Governor Inslee:

The undersigned have become aware of Washington Substitute Senate Bill 6203, the so-called "carbon tax" bill, presently being considered by the Washington Legislature. While we understand that you may have personal and political reasons for promoting that bill, the States of Montana and Wyoming have grave concerns regarding the legality of Washington's proposed legislation.

Washington State obviously does not have jurisdiction to regulate environmental issues in Montana and Wyoming. Yet the clear intent of SSB 6203 is to force non-Washington power generation facilities into compliance with Washington air quality regulations through the imposition of a tax on carbon dioxide emitted outside Washington. As applied to electricity generation, the tax is paid by consumers, and is clearly intended to pressure the utilities and other consumers importing electricity into Washington to abandon use of targeted facilities located in other states. While Washington may pursue a policy of eliminating certain electricity generation methods, that policy cannot be enforced extraterritorially. We also note that the only coal-fired electricity generating facility in Washington that might be subject to SSB 6203 is exempted from the proposed tax.

States that have attempted similar extraterritorial legislation have had no success withstanding judicial scrutiny.<sup>1</sup> SSB 6203 will very clearly adversely impact the economies and therefore tax revenues of states that generate electricity for consumption not only in Washington but throughout the West. The effect of SSB 6203 goes far beyond environmental concerns in Washington. The United States Constitution forbids states from regulating interstate commerce.

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<sup>1</sup> See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), and *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016).

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**MONTANA DEPARTMENT OF JUSTICE**

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division  
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

Also, Washington's effort to require out-of-state entities to comply with the statute's exemption provisions likely conflicts with the federal Clean Air Act. Air quality standards are established by the federal Environmental Protection Agency. 42 U.S.C. § 7408. Washington State's ability to regulate emissions established by the EPA is limited to its geographical boundaries. 42 U.S.C. § 7407(a); *see also* § 7401(a)(3). Indeed, states are encouraged to cooperate with one another. § 7402(a).

Finally, the Federal Energy Regulatory Commission has exclusive authority to regulate the transmission and sale of electric energy in interstate commerce, without regard to the source of production.<sup>2</sup> A carbon tax imposed by Washington, on electricity generated outside of Washington's borders, will negatively impact retail prices for consumers in states with utilities also drawing on those power generating facilities. The tax will further impact not only power generation but the development of the natural resources that fuel that generation.

The requirements and exemptions of SSB 6203 encroach on the authority of Montana and Wyoming to regulate industry and generate revenue within their respective borders. The reasons stated herein are not exhaustive. Should Washington SSB 6203 pass, it should not be signed into law.

Sincerely,



TIM FOX  
Attorney General, Montana



PETER K. MICHAEL  
Attorney General, Wyoming

c: Sen. Reuven Carlyle, Primary Sponsor  
Sen. Sharon Nelson, Senate Majority Leader  
Sen. Randi Becker, Senate Republican Caucus Chair  
Rep. Pat Sullivan, House Majority Leader  
Rep. Dan Kristiansen, House Minority Leader  
Rep. Frank Chopp, House Speaker

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<sup>2</sup> *Assoc. of Public Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1173 (9<sup>th</sup> Cir. 1997), and *United States v. Public Utilities Comm'n of California*, 345 U.S. 295 (1953).